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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-707

ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL AND REHABILITATION SERVICE, JOHN D. TWINAME, Administrator,

Respondents,

D.N.A., INC., WELFARE CLIENTS; NATIONAL WELFARE RIGHTS ORGANIZATION AND ITS ARIZONA AFFILIATES: MARICOPA COUNTY LEGAL AID SOCIETY CLIENTS,

Intervenors/Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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S. Rep. No. 711, 75th Cong., 1st Sess. 6

STATEMENT OF THE CASE

We adopt Petitioner's statement of the case at p. 5-15 of its Petition for a Writ of Certiorari except for the paragraph on p. 14-15.

ARGUMENT

Rule 19, Supreme Court Rules, governs decisions concerning petitions for certiorari. The Rule states that review on such writs is a discretionary matter--not of right. As this Court stated in Fay v. Noia, 372 U.S. 391, 436 (1963), "Review on certiorari . . . does not provide a normal appellate channel in any sense comparable to the writ of error." The Rule specifically states that such review "will be granted only where there are special and important reasons therefor." It then goes on to indicate the types of reasons which will be considered. The only ones that could be applicable to this case are: (1) where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the

same matter; or (2) has decided an important question of federal law which has not been, but should be, settled by this court; or (3) has decided a federal question in a way in conflict with applicable decisions of this court.

None of these reasons exist in this case.

(1) There are no conflicting Court of Appeals decisions on the same matter.

Concerning the original four conformity issues, which are stated at p. 9-12 of the Petition for Writ of Certiorari submitted by the Arizona State Department of Public Welfare [hereinafter referred to as "Pet. for Cert."], the welfare department's position on issues 1, 2, and 4 is that the relevant HEW regulations are invalid--not that the state regulations are in compliance

with them. Pet. for Cert. at 18-19, 21, 27-29, 31-32. In the proceeding below the Ninth Circuit Court of Appeals held that all the HEW regulations were valid. Pet. for Cert. at appendix A13-15, A17-19, A21-23. The court did not indicate any contradictory Court of Appeals decisions. And in its Petition for Certiorari the welfare department has not cited any Court of Appeals decisions even generally in support of its assertion that the applicable HEW regulations are invalid--let alone a decision that struck them down.

The welfare department's position on the third original issue (listed at p. 11 of Pet. for Cert.) is that its regulation is consistent with 42 U.S.C. §602(a)(10). Pet. for Cert. at 23. The Ninth Circuit

held otherwise. Pet. for Cert. at A29-31. Again, neither it nor the welfare department in its Petition for Certiorari cite any conflicting Court of Appeals decision.

Thus, there is no necessity for this Court to grant the writ in order to secure uniformity of decision. There is not a single Court of Appeals decision contrary to that of the Ninth Circuit Court of Appeals below on any of the issues in this case.

(2) No important question of federal law was decided by the court below which has not been, but should be, settled by this Court.

In deciding whether or not a case is one that should be reviewed under certiorari this Court considers whether or not it presents new and plausible federal questions on which law needs to be made. Madden,

One Supreme Court and the Writ of Certiorari, 15 Hastings L. J. 153, 159-60 (1963). As Chief Justice Hughes pointed out, review by certiorari is "in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants." S. Rep. No. 711, 75th Cong., 1st Sess., p. 39.

Thus, the fact that the decision sought to be reviewed is wrong does not mean that the Supreme Court will take it for review. 15 Hastings L. J. supra at 159. Chief Justice Vinson stated:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case . . . A petition for certiorari should explain why it is vital that the question involved be decided finally by

> the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose.

69 Sup. Ct. V, VI-VII (1949). Similarly Justice Harlan has stated that "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari." Harlan, Manning the Dikes, 13 Record of the Ass'n of the Bar of the City of New York 541, 551 (1958).

In its Petition for Certiorari Arizona has attempted only to show that the decision by the Secretary of HEW and the Ninth Circuit Court of Apppeals were in error. Arizona has not indicated any novel federal questions involved in its attack on HEW's rule-making power nor any other reasons why it is vital that this Court grant its Petition for

Certiorari.

Even Arizona's attempt to demonstrate error in the decisions below is without merit. Concerning its 90-day termination policy for recipients who move out of the state Arizona contends that the HEW regulation with which it fails to conform is "a definition of residency not contemplated by Congress", and therefore beyond HEW's rule-making authority. Pet. for Cert. at 19. However, as the Court of Appeals stated below:

> [W]e cannot find the Secretary's definition inconsistent with the letter or the spirit of the [Social Security] Act merely because it holds the states to a higher standard.

Pet. for Cert. at appendix A14.

Similarly, this Court has upheld a HEW regulation which defined the terms "income and resources" contained in the Act so as

to place more stringent requirements on state AFDC programs. Lewis v. Martin, 397 U.S. 552 (1970). Moreover, Arizona has failed to state the "compelling indications" that HEW's construction of the statute is wrong which is required to strike down the construction of a statute by the agency charged with its execution. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

Concerning the AFDC income-disregard issue, Pet. for Cert. at 10, Arizona's position is that the HEW regulation requiring the income disregard to be applied to gross income is in violation of King v. Smith, 392 U.S. 309 (1968) and Dandridge v. Williams, 397 U.S. 471 (1970) evidently because it allegedly interferes with the

State's latitude in dispensing funds. See Pet. for Cert. at 21, A18.

The Ninth Circuit Court of Appeals found, however, that the HEW rule does not interfere in this way. See Pet. for Cert. at appendix A19. Furthermore, the State's power in dispensing funds is certainly limited by valid federal requirements and Arizona has failed to indicate any respect in which the HEW requirement is otherwise invalid.

Concerning its requirement that the caretaker-relative or the welfare department must have legal custody of a child whose siblings are also receiving AFDC in the home of their natural parents in order for such child to be eligible for AFDC, Arizona contends merely that the decisions of the Secretary and of the Court of Appeals were

incorrect in finding that this requirement failed to conform to 42 U.S.C. §602(a)(10). Pet. for Cert. at 23-26.

This is insufficient reason for granting Arizona's petition. This Court has always given deference to HEW's interpretation of the Social Security Act. See, e.g., Rosado v. Wyman, 397 U.S. 397, 415 (1970) and Lewis v. Martin, 397 U.S. 552, 559 (1970). Furthermore, there is no reason for this Court to review the Court of Appeals decision upholding HEW's conclusion that the State failed to conform. Under 42 U.S.C. §1316 Congress has vested the Courts of Appeals with responsibility for reviewing such conformity determinations. They are to be upheld if they are supported by substantial evidence. 42 U.S.C. §1316(a)(4). See Appendix A. This Court has stated that in

situations where "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility" for reviewing agency findings on the basis of substantial evidence "decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality" should be left undisturbed. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 502 (1950).

Concerning the HEW requirement that the State establish a state-wide advisory council composed of 1/3 welfare recipients or their representatives Arizona argues that the regulation adds another advisory council requirement not intended by Congress, and that it is not "necessary for the proper and efficient operation of the Social Security

Act." Pet. for Cert. at 29-32.

As to Arizona's argument that HEW has added a requirement not intended by Congress, the Court of Appeals stated that the "beneficient purposes of the Social Security Act would be stultified by rigidly attributing to each Congressional attempt to improve the Act's responsiveness a concomitant Congressional intent not to permit further administrative improvements by those charged with the Act's implementation." Pet. for Cert. at appendix A22.

Moreover, the Court upheld the Secretary's finding that the regulation was "necessary for the proper and efficient administration of the [state's] plan" on the basis of the substantial evidence standard set out in the relevant statute. Pet. for Cert. at appendix

A23. There is no reason, therefore, as explained above, for this Court to disturb this decision since it was based on a fair assessment of the record. NLRB v. Pittsburgh Steamship Co., supra.

(3) The Court of Appeals decision does not conflict with any applicable decisions of this Court.

Concerning the AFDC income-disregard issue, Pet. for Cert. at 10, Arizona does not contend that its method of subtracting the income disregard from net income is consistent with the HEW regulation requiring that the income disregard be applied to gross income. Instead, Arizona argues that the HEW regulation is in violation of King v. Smith, 392 U.S. 309 (1968) and Dandridge v. Williams, 397 U.S. 471 (1970). Pet. for Cert. at 21. Arizona does not specify the way in which it believes the HEW regulation to conflict with these cases. However,

in the Ninth Circuit Court of Appeals Arizona contended that the federal regulation infringes on the state's power to set the level of benefits relying on King and Dandridge, supra. Pet. for Cert. at appendix A18.

Arizona makes a similar argument with regard to HEW's requirement that it set up an advisory council, contending that the requirement "violates the spirit of cooperative federalism". Arizona cites King v. Smith, supra, in reliance. Pet. for Cert. at 27-28.

In upholding the applicable federal regulations the Court of Appeals decision is not inconsistent with these cases. Even if HEW is interfering with the State's power to set the level of benefits, it may do so if the requirement it imposes is valid.

> There is of course no question that the Federal Government, unless

> barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.

King v. Smith, supra, at 333 n. 34.

Concerning Arizona's contention that the HEW advisory council requirement violates the spirit of cooperative federalism, King v. Smith, supra, is on point.

> The AFDC program is based on scheme of cooperative federalism. . . . States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of [HEW]. . . . The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW.

Id. at 316-17. (Emphasis added).

Thus, the Court of Appeals decision upholding HEW's income disregard and advisory council regulations does not conflict with King v. Smith and Dandridge v. Williams.

CONCLUSION

Arizona's Petition for a Writ of Certiorari must be denied. There are no conflicting Court of Appeals decision concerning the issues it raises. The Ninth Circuit Court of Appeals, in upholding HEW's finding of non-conformity on all four issues, decided no federal questions which should require the scrutiny of this Court. Furthermore the decision was consistent with applicable decisions of this Court.

RESPECTFULLY SUBMITTED this 28th day of December, 1971.

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fiscal year beginning after June 30, 1967, shall be available, under such terms and conditions as the Secretary may establish, for payments to States to cover so much of the cost of such projects as is not covered by payments under such subchapters and is not included as part of the cost of projects for purposes of section 1310 of this title.

Aug. 14, 1935, c. 531, Title XI, § 1115, as added July 25, 1962, Pub.L. 87-543, Title I, § 122, 76 Stat. 192, and amended July 30, 1965, Pub. L. 89-97, Title I, § 121(c) (3), 79 Stat. 352; June 29, 1967, Pub.L. 90-36, § 2, 81 Stat. 94; Jan. 2, 1968, Pub.L. 90-248, Title II, §§ 241(c) (4), 247, 81 Stat. 917, 918.

Historical Note

1968 Amendment. Pub.L. 90-248, § 241(c) (4), in the opening phrase deleted "IV," following "I," and inserted ", or part A of subchapter IV of this chapter," after "XIX of this chapter".

Pub.L. 90-248, § 247, substituted in second sentence "$4,000,000" for "$2,000,000" and "beginning after June 30, 1967" for "ending prior to July 1, 1968".

1967 Amendment. Pub.L. 90-36 substituted "July 1, 1968" for "July 1, 1967".

1965 Amendment. Pub.L. 89-97 included in the enumeration in the opening phrase, and clauses (a) and (b), subchapter XIX of this chapter, and sections 1396a and 1396b of this title, respectively.

Effective Date of 1965 Amendment. Section 121(c) (3) of Pub.L. 89-97 provided in part that the amendment of this section by Pub.L. 89-97 shall be effective Jan. 1, 1966.

Legislative History. For legislative history and purpose of Pub.L. 87-543, see 1962 U.S.Code Cong. and Adm.News, p. 1943. See, also, Pub.L. 89-97, 1965 U.S. Code Cong. and Adm.News, p. 1943; Pub.L. 90-36, 1967 U.S. Code Cong. and Adm.News, p. 1289; Pub.L. 90-248, 1967 U.S.Code Cong. and Adm.News, p. 2834.

Library References

United States ⇐82. C.J.S. United States § 182.

§ 1316. Administrative and judicial review of public assistance determinations

(a) (1) Whenever a State plan is submitted to the Secretary by a State for approval under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such subchapter. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(2) Any State dissatisfied with a determination of the Secretary under paragraph (1) with respect to any plan may, within 60 days after it has been notified of such determination, file a petition with the Secretary for reconsideration of the issue of whether such plan conforms to the requirements for approval under such subchapter.

Within 30 days after receipt of such a petition, the Secretary shall notify the State of the time and place at which a hearing will be held for the purpose of reconsidering such issue. Such hearing shall be held not less than 20 days nor more than 60 days after the date notice of such hearing is furnished to such State, unless the Secretary and such State agree in writing to holding the hearing at another time. The Secretary shall affirm, modify, or reverse his original determination within 60 days of the conclusion of the hearing.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary under section 304, 604, 1204, 1354, 1384, or 1396c of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determination as provided in section 2112 of Title 28.

(4) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(5) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) For the purposes of subsection (a) of this section, any amendment of a State plan approved under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, may, at the option of the State, be treated as the submission of a new State plan.

(c) Action pursuant to an initial determination of the Secretary described in subsection (a) of this section shall not be stayed pending reconsideration, but in the event that the Secretary subsequently determines that his initial determination was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

(d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, shall be disallowed for such par-

ticipation, the State shall be entitled to, and upon request shall receive a reconsideration of the disallowance.

Aug. 14, 1935, c. 531, Title XI, § 1116, as added July 30, 1965, Pub.L. 89-97, Title IV, § 404(a), 79 Stat. 419, and amended Jan. 2, 1968, Pub. L. 90-248, Title II, § 241(c) (5), 81 Stat. 917.

Historical Note

1968 Amendment. Subsec. (a) (1). Pub.L. 90-248, § 241(c) (5) (A), deleted "IV," following "I," and inserted "or part A of subchapter IV of this chapter," after "XIX of this chapter,".

Subsecs. (b), (d). Pub.L. 90-248, § 241(c) (5) (B), deleted "IV," following "I," and inserted ", or part A of subchapter IV of this chapter," after "XIX of this chapter".

Effective Date. Section 404(b) of Pub. L. 89-97 provided that: "The amendment made by subsection (a) [adding this section] shall apply only with respect to determinations made after December 31, 1965."

Legislative History. For legislative history and purpose of Pub.L. 89-97, see 1965 U.S.Code Cong. and Adm.News, p. 1943. See, also, Pub.L. 90-248, 1967 U.S. Code Cong. and Adm.News, p. 2834.

Notes of Decisions

Construction with other laws 1
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1. Construction with other laws

Reference in section 2000d-2 of this title to judicial review as may otherwise be provided by law is not limited to the judicial review already in existence when said section was enacted, and does not preclude judicial review in accordance with this section declaring that any state dissatisfied with final determination of Secretary may file petition for review with Court of Appeals. Gardner v. State of Ala. for and in Behalf of Dept. of Pensions and Sec., C.A.Ala.1967, 385 F.2d 804, certiorari denied 88 S.Ct. 773, 389 U.S. 1046, 19 L.Ed.2d 839.

Notwithstanding absence of specific statutory provision for review of order terminating federal funds for child welfare service program under this chapter, in view of this section and section 2000d-2 of this title giving Court of Appeals exclusive jurisdiction of review of order terminating federal funds for the other four social security welfare programs because of alleged racial discrimination in administration of programs, consideration of the several programs and sensible judicial administration required construction of said sections to give Court of Appeals jurisdiction to review order terminating all five programs. Id.

2. Parties

Action of State in joining four individuals as parties plaintiff in suit filed in district court challenging validity of order of Secretary terminating payment of approximately $100,000,000 in federal funds to state agency disbursing welfare did not defeat sole and exclusive jurisdiction of Court of Appeals granted by this section over actions brought by State to review order terminating federal funds to state agency. Gardner v. State of Ala. for and in Behalf of Dept. of Pensions and Sec., C.A.Ala.1967, 385 F.2d 804, certiorari denied 88 S.Ct. 773, 389 U.S. 1046, 19 L.Ed.2d 839.

3. Review

In view of provision of this section for judicial review of agency action in the Court of Appeals and section 2000d-2 of this title stating that order terminating federal funds was reviewable in same manner as review of order for termination of funds under other sections of this chapter, Court of Appeals had sole and exclusive jurisdiction to review order of Secretary terminating federal welfare funds for State because of its failure to comply with regulations prohibiting discrimination in welfare programs financed by funds given under this chapter. Gardner v. State of Ala. for and in Behalf of Dept. of Pensions and Sec., C.A. Ala.1967, 385 F.2d 804, certiorari denied 88 S.Ct. 773, 389 U.S. 1046, 19 L.Ed.2d 839.